

EXHIBIT “C”

Martin J. Lubber, M.D.

May 24, 2010

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION
3:09-CV-10334-PBS

* * * * *
GEOFFREY CROWTHER, *
Plaintiff *
V. *
CSX TRANSPORTATION, INC., *
and CONSOLIDATED RAIL CORP., *
Defendants *
* * * * *

DEPOSITION OF: DR. MARTIN J. LUBER
OFFICES OF NEW ENGLAND ORTHOPEDIC SURGEONS
300 Birnie Avenue
Springfield, Massachusetts 01107
May 24, 2010, 5:30 p.m.

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1 A. No.

2 Q. Altered?

3 A. No.

4 Q. Has any disciplinary action ever
5 been taken against you?

6 A. No.

7 Q. Okay. Have you authored any
8 papers or conducted any research?

9 A. I have. They're listed in my CV.

10 Q. Are any of them related to
11 repetitive stress injuries?

12 A. They are not.

13 Q. Is it your understanding that
14 you've been retained as an expert by Mr. Joyce
15 in this case?

16 A. I don't believe that I have been.
17 I believe I've been retained as a witness of
18 fact for the services I provided for
19 Mr. Crowther.

20 Q. Okay. So were you paid for your
21 narrative report?

22 A. I believe that I was, yes.

23 Q. Have you served as an expert
24 witness in the past?

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1 A. I have not.

2 Q. Have you testified in court before?

3 A. No.

4 Q. But you said you've given prior
5 depositions?

6 A. Yes.

7 Q. What were those in connection
8 with?

9 A. Care rendered to patients.

10 Q. On a fact witness basis?

11 A. Yes.

12 Q. Were they personal injury cases, or
13 medical malpractice cases, if you know?

14 A. Personal injury cases.

15 Q. Okay. Do you have any connection
16 to the railroad industry?

17 A. I do not.

18 Q. And referring back your report or
19 your narrative report, does your narrative
20 report contain all of your opinions with regard
21 to Mr. Crowther's condition?

22 A. It contains my opinion regarding
23 the injury that I treated him for regarding his
24 left elbow.

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1 related to Mr. Crowther's job duties at the
2 railroad?

3 A. I did.

4 Q. What documents did you review?

5 A. I had a listing of the job
6 description that he provided for or while on the
7 job at the railroad.

8 Q. Do you have a copy of that?

9 A. I don't currently in my possession.

10 MR. JOYCE: I do. Do you want what
11 I sent to him, Heather?

12 MS. GAMACHE: Yes, that would be
13 great.

14 MR. JOYCE: I sent two. I sent him
15 the actual trackman.

16 MS. GAMACHE: Yeah, I'm going to
17 mark them as exhibits. We can mark them
18 as Exhibit 5.

19
20 (Exhibit 5, CSX Job Description,
21 2 pgs., Marked.)
22

23 Q. (By Ms. Gamache) Take a look at
24 those, and let me know if those are the

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1 documents you reviewed.

2 A. (Doctor looks over documents.)

3 Yes, these are what I reviewed when preparing
4 his narrative report.

5 Q. Do you mind if I take a look at
6 them real quick.

7 Other than the medical records from
8 your office, the entire NEOS office, did you
9 review any outside medical records?

10 A. No.

11 Q. And other than the two documents
12 provided to you by Mr. Joyce, the CSX Position
13 Information document, did you review any other
14 documents related to Mr. Crowther's job duties?

15 A. No.

16 Q. Did you have any conversations with
17 Mr. Crowther regarding his job duties?

18 A. Not that I recall.

19 Q. So you don't recall discussing his
20 job with him while you were treating him?

21 A. We did in terms of his abilities to
22 return to work after the fact. I don't recall
23 any specific other descriptions or conversations
24 regarding his job duties, and how they would

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1 pertain to his left elbow.

2 Q. When you say after the fact, are
3 you referring to after the surgery, his left
4 elbow surgery?

5 A. No. When we first treated him,
6 when I first treated him in 2007, we did
7 describe how his left elbow pain was associated
8 with, or at least brought upon by his working,
9 i.e., when he worked, he would have elbow pain.
10 And after his elbow surgery, we did discuss how
11 it might impact his ability to return to work.

12 Q. Okay. And so am I correct that you
13 don't recall having any conversations with him
14 regarding tools that he used, or the way in
15 which he held the tools, or anything of that
16 nature?

17 A. I don't recall.

18 Q. Okay. Did you rely on any
19 literature in reaching your opinion that's in
20 the narrative report?

21 A. In my -- the literature I reviewed
22 for my general education and how I provide
23 orthopedic services, but not specifically an
24 article directly related to Mr. Crowther's

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1 by CSX Industries, would in fact increase the
2 likelihood that Mr. Crowther would develop
3 degenerative osteoarthropathy of his left elbow
4 and result in mechanical symptoms associated
5 with loose bodies."

6 When you refer to work habits, what
7 are you referring to, that is different from his
8 work requirements? How is habit different than
9 requirement?

10 A. I don't believe that they are.
11 Different choice of words.

12 Q. So you're using habit and
13 requirement synonymously?

14 A. Yes.

15 Q. Okay. And you testified earlier
16 that you did not speak, or you don't recall a
17 specific conversation with Mr. Crowther
18 regarding work habits?

19 A. I don't recall a specific
20 conversation, no.

21 Q. Okay. So in preparing your
22 narrative, you didn't speak to Mr. Crowther
23 beforehand in preparation to prepare the
24 narrative?

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1 A. No.

2 Q. Is it your opinion that
3 Mr. Crowther's work, his normal every day work
4 on the railroad could cause or contribute to the
5 degenerative changes that he was suffering from
6 in his left elbow?

7 A. It is.

8 Q. You have not given an opinion, am I
9 correct, whether or not anything separate and
10 aside from those daily work habits -- I'm sorry,
11 let me rephrase that.

12 Would you agree that any activity
13 could, any repetitive activity at work could
14 cause the degenerative condition that he was
15 suffering from?

16 A. I think any repetitive work could
17 increase the likelihood of developing arthritis,
18 yes.

19 Q. So you have not provided an opinion
20 regarding whether there was something -- whether
21 the position, he was holding something, or the
22 specific work that he was doing, whether there
23 was anything wrong with it, just simply that he
24 was doing it?

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1 A. Correct.

2 Q. So you have not given an opinion
3 regarding whether CSX could have done something
4 differently to prevent Mr. Crowther from
5 developing a degenerative condition?

6 MR. JOYCE: Dr. Lubner is not our
7 liability expert, he's simply a medical
8 causation expert, so we're not offering an
9 unsafe work place, if that's what you
10 mean.

11 MS. GAMACHE: I understand. I'm
12 just confirming that he's not providing an
13 opinion, he's simply saying the repetitive
14 activity at work caused or at least
15 contributed to the degenerative changes.

16 MR. JOYCE: Okay.

17 MS. GAMACHE: Is that correct?

18 THE WITNESS: Correct.

19 Q. (By Ms. Gamache) Would you agree
20 that there are other activities can cause
21 degenerative changes in the elbow?

22 A. Yes.

23 Q. What types of activities can cause
24 degenerative changes?

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1 A. I have not seen that personally or
2 described in the literature.

3 Q. How about fly fishing?

4 A. Fly fishing is in some degree
5 repetitive with casting. It would depend upon
6 which arm, I guess, you casted with.

7 Q. And I'm not sure if it's in your
8 record -- it's probably somewhere in your
9 records that Mr. Crowther is right hand
10 dominant, correct?

11 A. I'd have to review my records. If
12 that is accurate, I don't know that.

13 Q. I can represent to you that he's
14 right hand dominant.

15 A. Fine.

16 Q. And this injury was his left
17 elbow, correct?

18 A. Correct.

19 Q. Is there -- do you have any
20 objective scientific evidence that
21 Mr. Crowther's work activities were exacerbated
22 by -- oh, I'm sorry, Mr. Crowther's elbow
23 disease process was exacerbated by his work
24 activities?

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1 A. No.

2 Q. Do you have an opinion regarding
3 when Mr. Crowther became symptomatic, when his
4 left elbow became symptomatic?

5 A. He first complaint of it to
6 Dr. Wenner, who was treating him for or seeing
7 him for his hand, I believe in 2006 or 2007.
8 He was referred to me in 2007. That was the
9 first knowledge I had of his complaints.

10 Q. In general, in your opinion, when
11 does a patient become symptomatic?

12 A. Well, I mean, I would relate being
13 symptomatic to having enough complaints to seek
14 out medical care for.

15 Q. Were you aware of Mr. Crowther
16 seeking out medical attention prior to 2006?

17 A. I am not.

18 Q. If I represent to you that
19 Mr. Crowther sought medical attention in 2002
20 for elbow pain, and was diagnosed with bilateral
21 medial epicondylitis, as well as tennis elbow
22 and cubital tunnel, would that change when you
23 believe he became symptomatic for the disease
24 process in his left elbow?

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1 Q. Is Cubital Tunnel Syndrome in any
2 way indicative of degenerative changes?

3 A. Not necessarily.

4 Q. In what way would it be indicative
5 of degenerative changes?

6 A. There is a condition called Tardy
7 Ulnar Nerve Palsy, which is Cubital Tunnel
8 Syndrome, which develops years after a
9 fracture. It usually is associated with
10 significant loss of motion. But those are
11 different than Mr. Crowther's elbow, which had
12 range of motion with mechanical locking
13 episodes, so different disease process.

14 Q. Have you treated other railroad
15 workers with a similar condition?

16 A. I have not.

17 Q. Is the degenerative condition that
18 Mr. Crowther suffers from in his left elbow, is
19 that a common condition?

20 A. Elbow arthritis is relatively
21 uncommon.

22 Q. Do you treat other railroad
23 workers, in general?

24 A. I have seen other railroad

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1 workers. I don't have a large percentage of
2 them in my practice.

3 Q. The ones that you have seen, do you
4 know whether they have the same position or type
5 of position that Mr. Crowther had?

6 A. I do not know that for a fact.

7 Q. Okay. Is there any way to
8 determine the actual cause of the degenerative
9 condition?

10 A. No, not to my knowledge. Could I
11 rephrase that?

12 Q. Sure.

13 A. It is more likely that you will
14 develop degenerative change after an
15 intra-articular fracture. So if we have a
16 fracture in the knee, it's more likely to
17 develop degenerative change later, but it's a
18 different condition, so.

19 Q. Are you aware of Mr. Crowther
20 suffering from any intra-articular fracture in
21 any way?

22 A. Not that I'm aware of.

23 Q. So to diagnose a degenerative
24 condition, you would assess symptoms, and then

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1 that I have in front of me.

2 MS. GAMACHE: Then we'll that as an
3 exhibit, as well.

4
5 (Exhibit 6, Office Note, 2/26/07,
6 Marked.)

7
8 Q. (By Ms. Gamache) Now, referring
9 back to what was marked as Exhibit 6, is that
10 your office note dated February 26th, 2007?

11 A. It is.

12 Q. In your office note, it indicates
13 in the first paragraph, "Since he has been
14 relatively inactive, his left elbow has become
15 relatively asymptomatic for him;" is that
16 correct?

17 A. Yes.

18 Q. So at the time you saw him -- at
19 the time that you saw Mr. Crowther, was he --
20 what were his symptoms, if you've written
21 relatively asymptomatic?

22 A. He was really having little or no
23 symptoms, because, again, recent surgery with
24 Dr. Cowan and separately with Dr. Wenner, he

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1 hadn't been using his arm very much.

2 Q. And that, based on the records, was
3 the first time that you saw --

4 A. That was the first time I was asked
5 to see him, yes.

6 Q. Okay. Do you recall, at any point
7 after seeing Mr. Crowther for the first time on
8 February 26th, 2007, his condition worsening,
9 his left elbow condition?

10 A. Not until he returned to me in, I
11 believe it was 2009, when he was experiencing
12 more mechanical episodes in his left elbow.

13 Q. Would you consider that to be an
14 aggravation or exacerbation of his condition
15 from when you saw him on February 26th, 2007?

16 A. Yes. As I outlined in that
17 original note, the reason to do surgery would be
18 based upon whether or not he was having
19 mechanical locking episodes.

20 Q. I'm going to refer you to a note
21 dated March 19th, 2007.

22 A. I don't have that, as well.

23 Q. Okay. That's fine.

24 A. (Doctor looks over document.)

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1 had bilateral total knee arthroplasty with
2 Dr. Laymen . I never treated him for his knee.

3 Q. Okay. Although that's in one
4 sentence, when you say he has been having
5 ongoing mechanical symptoms and discomfort, are
6 you referring, then, to his knee or his elbow?

7 A. To his elbow.

8 Q. And I believe you testified earlier
9 that that would be -- that based on the times
10 you saw him in February of 2007 and March of
11 2007, that in January of 2009, he is no longer
12 asymptomatic, and is now --

13 A. Having symptoms.

14 Q. -- having symptoms?

15 A. That has brought him back to seek
16 care, yes.

17 Q. And I believe you testified that
18 that was an aggravation of his condition?

19 A. At least his symptoms were enough
20 that he cycled back to seek care again regarding
21 his left elbow.

22 Q. If I represent to you that
23 Mr. Crowther did not work at all between when
24 you saw saw him in 2007 to 2009, is it safe to

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1 state that conditions, other than his work, were
2 aggravating his condition?

3 MR. JOYCE: Objection.

4 THE WITNESS: I'm answering?

5 MR. JOYCE: Yes.

6 THE WITNESS: Other things may have
7 exacerbated his elbow at that time, yes.

8 Q. (By Ms. Gamache) I'm going to
9 refer you back to the February 26th, 2007
10 record.

11 A. Yes.

12 Q. That was the first day that you
13 that treated Mr. Crowther. On that date, based
14 on the elbow -- based on the condition of the
15 elbow, would you have considered him unable to
16 work, simply referring to the elbow condition,
17 not any other condition he was suffering from?

18 A. That question wasn't posed to me at
19 that time. I would have assumed that he could
20 be able to work, given the way his elbow
21 appeared on that date.

22 Q. Okay. And based on his condition
23 on that date, would you have considered him able
24 to work at full capacity?

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1 is related to what the patient tells me upon
2 arrival

3 Q. Okay. And that's information that
4 you take down, or someone else takes down?

5 A. That I take down.

6 Q. Okay. And when you say past
7 several years, is that more than one year?

8 A. It is certainly non-specific, but
9 it would be more than one year.

10 Q. Is it more than two years?

11 A. I don't know. Several would
12 usually mean more than two.

13 MS. GAMACHE: Okay. I'm going to
14 take a minute and review any notes, Tom.

15 MR. JOYCE: Sure.

16 Q. (By Ms. Gamache) Going back to
17 when you prepared your narrative report, you
18 indicated that you referred to what's been
19 marked as Exhibit 5, which were job
20 descriptions. Did you assess any activity
21 versus rest period, as far as manual labor, and
22 how Mr. Crowther's job duties would have caused
23 or contributed to his degenerative condition?

24 A. No.

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1 Q. So you didn't speak to him or
2 assess any percentage, if he's doing manual
3 work, this percentage of time versus resting it
4 percentage of the time?

5 A. I did not.

6 Q. Have you ever visited a job site
7 where individuals doing what Mr. Crowther did in
8 his work duties were doing?

9 A. No.

10 Q. Also looking at your report, on the
11 second page, in the second to last paragraph,
12 you indicate, "At this time, I believe that to a
13 reasonable degree of medical certainty that
14 Mr. Crowther's left elbow injury was exacerbated
15 and aggravated, and at least partially caused by
16 his work history at CSX Transportation."

17 What other causes, in your opinion
18 -- or I'm sorry, what else, other than his work,
19 caused his degenerative condition?

20 A. Without certain knowledge, but
21 there is a suggestion in his original CT scan
22 that he might have had an old osteochondritis
23 dissecans lesion on his capitellum.

24 Q. And can you tell, based -- I'm

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1 MS. GAMACHE: Oh, it's in your
2 file. We don't need to mark it as an
3 exhibit, then.

4 Q. (By Ms. Gamache) And the OCD that
5 you're referring to was visible on the CT scan,
6 correct?

7 A. Correct.

8 Q. Okay.

9 A. Well, it can't be confirmed to be
10 an OCD lesion, but that is the most likely
11 diagnosis that would be associated with the
12 radiographic abnormalities seen on the CT scan.

13 Q. And it's possible that the OCD
14 caused Mr. Crowther's degenerative condition?

15 MR. JOYCE: Objection.

16 THE WITNESS: It is possible that
17 the OCD lesion was a contributing factor
18 to his development of arthritis.

19 Q. (By Ms. Gamache) Is there any way
20 to determine whether one contributing factor,
21 whether it's the OCD or Mr. Crowther's job
22 duties, caused or contributed more to the
23 development of his degenerative condition?

24 MR. JOYCE: Objection.

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1 THE WITNESS: I don't believe
2 that's possible.

3 Q. (By Ms. Gamache) I'm going to
4 refer you again to the CT scan. What, in
5 addition to OCD, did the CT scan reveal?

6 A. Again, degenerative spurring, and
7 multiple intra-articular loose bodies.

8 Q. If you don't mind, explain briefly
9 what spurring is.

10 A. In any joint that is undergoing
11 osteoarthritic change, and therefore, the loss
12 of cartilage on the end of the joint surfaces,
13 the most common response in the body is to make
14 osteophytes or bone spurs at the margins or
15 edges of those joints. In the elbow, those bone
16 spurs often cause limited range of motion.

17 Q. And then loose bodies?

18 A. Loose bodies are found in a joint
19 for various reasons, but most commonly during
20 the development of degenerative arthritis,
21 pieces of cartilage are damaged or flaked off or
22 loosened, and they grow over time, much like a
23 pearl does, and get larger.

24 Q. So this type of arthritic